ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1166 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WALTER COKE, INC., *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Petition for Review of Final Action of the Environmental Protection Agency 80 Fed. Reg. 33,840 (June 12, 2015)

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Circuit Rule 28(a)(1), Industry Petitioners state as follows:

A. Parties and Amici

1. Parties, Intervenors, and Amici Who Appeared in District Court

These cases are petitions for review of final agency action, not appeals from the ruling of a district court.

2. Parties to the Consolidated Cases

Petitioners

No. 15-1166:	Walter Coke, Inc.
No. 15-1216:	Walter Coke, Inc.
No. 15-1239:	Environmental Committee of the Florida Electric Power Coordinating Group, Inc.
No. 15-1243:	Utility Air Regulatory Group
No. 15-1256:	Southern Company Services, Inc. Alabama Power Company Georgia Power Company Gulf Power Company Mississippi Power Company Southern Power Company
No. 15-1265:	National Environmental Development Association's Clean Air Project
No. 15-1266:	Luminant Generation Company LLC Oak Grove Management Company LLC

Big Brown Power Company LLC
Sandow Power Company LLC

No. 15-1267: State of Florida
State of Alabama
State of Arizona
State of Arkansas
State of Delaware
State of Georgia
State of Kansas
State of Louisiana
State of Mississippi
State of Missouri
State of Ohio
State of Oklahoma
State of South Carolina
State of South Dakota
State of West Virginia
Commonwealth of Kentucky
North Carolina Department of Environment and Natural Resources

No. 15-1268: Union Electric Company, d/b/a Ameren Missouri

No. 15-1270: SSM Litigation Group

No. 15-1271: State of Tennessee

No. 15-1272: Georgia Coalition for Sound Environmental Policy
Georgia Industry Environmental Coalition

No. 15-1300: BCCA Appeal Group

No. 15-1301: Luminant Generation Company LLC
Oak Grove Management Company LLC
Big Brown Power Company LLC
Sandow Power Company LLC

No. 15-1302: Texas Oil & Gas Association

No. 15-1308: State of Texas
Texas Commission on Environmental Quality

Respondents

- United States Environmental Protection Agency ("EPA")
- Gina McCarthy, Administrator, EPA.

Intervenors for Respondents

- Citizens for Environmental Justice
- Environmental Integrity Project
- Natural Resources Defense Council
- People Against Neighborhood Industrial Contamination
- Sierra Club

3. *Amici* in This Case

There are no *amici curiae*.

B. Rulings Under Review

Petitioners seek review of EPA's final action entitled "State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA's SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction," published at 80 Fed. Reg. 33,840 (June 12, 2015).

C. Related Cases

Industry Petitioners are not aware of any related cases.

CORPORATE DISCLOSURE STATEMENTS

Industry Petitioners submit the following statements pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1:

Alabama Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10 percent or more of Alabama Power Company's stock. Southern Company is traded publicly on the New York Stock Exchange under the symbol "SO."

BCCA Appeal Group is a non-profit corporation whose membership forms a broad-based coalition of businesses with operations in Texas, with the common interest of achieving the mutual goals of clean air and a strong economy for Texas. BCCA Appeal Group has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly-held company has a 10 percent or greater ownership interest in the BCCA Appeal Group.

Big Brown Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC ("TCEH"). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company ("EFCH"), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. ("EFH Corp."). Substantially all of the common stock of EFH Corp., a Texas corporation, is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10 percent or greater equity ownership interest in EFH Corp.

Environmental Committee of the Florida Electric Power Coordinating Group, Inc. represents the interests of its member utilities, which include investor-owned utilities, electric cooperatives, and municipal utilities, on environmental issues that affect Florida's electric utility industry. The Florida Electric Power Coordinating Group, Inc. is a non-profit, non-governmental corporate entity organized under the laws of Florida. It does not have a parent corporation and no publicly held corporation owns ten percent or more of the Florida Electric Power Coordinating Group, Inc.'s stock.

Georgia Coalition for Sound Environmental Policy ("GCSEP") is a nonprofit corporation under the Georgia Nonprofit Corporation Code. GCSEP was organized to assist in the development of technically and legally sound environmental policy, including federal and state regulations designed to address, among other issues, air quality matters. Because GCSEP is an incorporated and continuing association of numerous companies and business organizations operated for the purpose of promoting the interests of its membership, no listing of its individual members that have issued shares or debt securities to the public is required under D.C. Circuit R. 26.1 (b). GCSEP has no shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10 percent or greater ownership interest in GCSEP.

Georgia Industry Environmental Coalition ("GIEC") is a not-for-profit association of diverse industries subject to environmental regulations in Georgia. GIEC has no shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10 percent or greater ownership interest in GIEC.

Georgia Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10 percent or more of Georgia Power Company's stock. Southern Company is traded publicly on the New York Stock Exchange under the symbol "SO."

Gulf Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10 percent or more of Gulf Power Company's stock. Southern Company is traded publicly on the New York Stock Exchange under the symbol "SO."

Luminant Generation Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC ("TCEH"). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company ("EFCH"), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. ("EFH Corp."). Substantially all of the common stock of EFH Corp., a Texas corporation, is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10 percent or greater equity ownership interest in EFH Corp.

Mississippi Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10 percent or more of Mississippi Power Company's stock. Southern Company is traded publicly on the New York Stock Exchange under the symbol "SO."

National Environmental Development Association's Clean Air Project ("NEDA/CAP") is a nonprofit trade association, as defined under Circuit Rule 26.1(b), whose member companies represent a broad cross-section of American industry. NEDA/CAP addresses issues of interest to its members relating to the development and implementation of requirements under federal and state clean air programs. NEDA/CAP does not have any outstanding securities in the hands of the public, nor does NEDA/CAP have a publicly owned parent, subsidiary, or affiliate.

Oak Grove Management Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC ("TCEH"). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company ("EFCH"), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. ("EFH Corp."). Substantially all of the common stock of EFH Corp., a Texas corporation, is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10 percent or greater equity ownership interest in EFH Corp.

Sandow Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, which is a Delaware limited liability company and is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC ("TCEH"). TCEH is a Delaware limited liability company and is a wholly owned subsidiary of Energy Future Competitive Holdings Company ("EFCH"), which is a Texas corporation and a wholly owned subsidiary of Energy Future Holdings Corp. ("EFH Corp."). Substantially all of the common stock of EFH Corp., a Texas corporation, is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10 percent or greater equity ownership interest in EFH Corp.

Southern Company Services, Inc. is traded publicly on the New York Stock Exchange under the symbol "SO."

Southern Power Company is a wholly-owned subsidiary of Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly-held company owns 10 percent or more of Southern Power's stock.

SSM Litigation Group is an ad hoc, informal organization of trade associations and business organizations formed to fund and conduct advocacy and litigation concerning regulation under the Clean Air Act of emissions from stationary sources, with particular emphasis on emissions during startup, shutdown, and malfunction events. As such, it has no parent company, subsidiaries or affiliates. It is unincorporated and, therefore, has no publicly traded stock, and no publicly held corporation owns 10 percent or more of stock in SSM Litigation Group.

Texas Oil & Gas Association is a non-profit corporation representing the interests of the oil and gas industry in the State of Texas. Texas Oil & Gas Association has no outstanding shares or debt securities in the hands of the public, and has no parent company. No publicly-held company has a 10 percent or greater ownership interest in the Texas Oil & Gas Association.

Union Electric Company, d/b/a/ Ameren Missouri is a wholly-owned subsidiary of Ameren Corporation, a publicly traded entity on the New York Stock Exchange.

Utility Air Regulatory Group ("UARG") is a not-for-profit association of individual electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10 percent or greater ownership interest in UARG.

Walter Coke, Inc. ("Walter Coke") formerly manufactured coke for use in blast furnaces and foundries. Walter Energy, Inc., is Walter Coke's parent corporation and is the only publicly held corporation that owns 10% or more of Walter Coke's stock.

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MISCELLANEOUS

GLOSSARY OF TERMS, ACRONYMS, AND ABBREVIATIONS

the Act	Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*
affirmative defense	As the term is used by EPA in its SIP Calls, a SIP provision that specifies criteria or preconditions that, if demonstrated by a source in a judicial or administrative enforcement proceeding, would provide a defense to imposition of civil monetary penalties.
the Agency	The United States Environmental Protection Agency
automatic exemption	As the term is used by EPA in its SIP Calls, a SIP provision that provides that if certain conditions existed during a period of startup, shutdown, or malfunction any exceedance of an otherwise applicable SIP emission limitation or control measure during that period would not be considered a violation.
BACT	Best available control technology
CAA	Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*
director's discretion provision	As the term is used by EPA in its SIP Calls, SIP provision that authorizes a state regulatory official unilaterally to grant exemptions or variances from, or to excuse noncompliance with, otherwise applicable emission limitations or control measures and to do so in a manner that would be binding on EPA and the public.
EPA	The United States Environmental Protection Agency
ESP	Electrostatic precipitator
FIP	Federal Implementation Plan
HAP	Hazardous Air Pollutant

JA	Joint Appendix
MACT	Maximum achievable control technology
malfunction	The sudden and unavoidable breakdown of process or control equipment.
NAAQS	National Ambient Air Quality Standards
RACT	Reasonably available control technology
SCR	Selective catalytic converter
shutdown	Generally, the cessation of operation of a source for any reason. Individual SIP provisions may include one or more definitions specifically tailored to individual source categories.
SIP	State Implementation Plan
SIP Calls	Findings of Substantial Inadequacy of State Implementation Plans and SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, published at 80 Fed. Reg. 33,840 (June 12, 2015)
SSM	Startup, shutdown, or malfunction of a source
startup	Generally, the setting in operation of a source for any purpose. Individual SIP provisions may include one or more definitions specifically tailored to individual source categories.
state	States, the District of Columbia, U.S. territories, local air permitting authorities, and eligible tribes that are currently administering, or may in the future administer, EPA-approved implementation plans.

JURISDICTIONAL STATEMENT

These petitions seek review of EPA's "Findings of Substantial Inadequacy" of State Implementation Plans ("SIPs") and "SIP Calls to Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction" (collectively, "SIP Calls"), published at 80 Fed. Reg. 33,840 (June 12, 2015) and the Clean Air Act ("CAA" or "the Act") interpretations they include. The Court has jurisdiction under CAA § 307(b)(1).[1] Petitioners consist of 19 states ("State Petitioners") that are subject to the SIP Calls, as well as 12 industrial companies regulated by the affected SIP provisions and 8 industry groups whose members are similarly regulated ("Industry Petitioners"). All of the petitions were timely filed under CAA § 307(b).

STATUTES AND REGULATIONS

The respective EPA and state SIP obligations and authorities are in CAA § 110. The SIP regulations and EPA's prior approvals of the called SIP provisions are codified in 40 C.F.R. Parts 51 and 52. The state regulatory provisions are in the applicable state codes. The addendum reproduces pertinent portions of the CAA and cited regulations.

[1] The Table of Authorities has parallel U.S. Code citations.

STATEMENT OF ISSUES

Whether the CAA:

1. Authorizes EPA to declare "substantially inadequate" and call SIP provisions based solely on their inconsistency with EPA's current interpretation of the Act, without examining the "available information" or demonstrating a negative impact on attainment or maintenance of the National Ambient Air Quality Standards ("NAAQS") or on an "applicable requirement" of the Act;

2. Requires states to impose restrictions on emissions for every period of source operation without exception, prohibits states from defining what constitutes a "violation" of those restrictions, or restricts the form in which states express a combination of continuously applicable emission limitations;

3. Prohibits states from limiting in a SIP the remedy that may be imposed under CAA §§ 113 or 304 for violation of an emission limitation or other control measure, or otherwise establishing a defense to judicially imposed sanctions for such a violation.

INTRODUCTION

EPA's SIP Calls mandate that 36 states[2] revise their previously EPA-approved SIPs, because EPA has decided that discrete provisions of those SIPs are inconsistent with "CAA requirements," and therefore are "substantially

[2] 80 Fed. Reg. at 33,847-48.

inadequate." The SIP Calls are based on alleged "facial inconsistencies" of the SIP provisions' language addressing emissions during periods of startup, shutdown, or malfunction of the applicable process or control equipment ("SSM") with EPA's latest interpretation of certain CAA provisions. They are not based on findings that the SIPs in question have failed to achieve any NAAQS or other requirement established under the CAA because of the SIPs' SSM provisions, or that removing or modifying the provisions EPA has identified is "necessary" to meet CAA objectives.

EPA exceeded its authority to issue SIP calls and incorrectly labeled the SIP SSM provisions contrary to requirements of the Act.

STATEMENT OF THE CASE

I. Statutory and Regulatory Context

A. The Federal-State Partnership

The CAA establishes a program for improving air quality that strictly divides responsibility between EPA and the states. EPA sets standards – the NAAQS – that specify maximum acceptable ambient concentrations of pollutants. CAA §§ 108-109. States, however, "bear primary responsibility for attaining, maintaining, and enforcing these standards" through development and implementation of SIPs under CAA § 110. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 30 (D.C. Cir. 2012), *rev'd & remanded*, 134 S. Ct. 1584 (2014), *quoting Am. Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998).

CAA § 110(a)(2)(A) requires that each SIP include:

> enforceable *emission limitations* and *other control measures, means, or techniques* (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, *as may be necessary or appropriate* to meet *the applicable requirements* of this chapter.

(Emphases added.) By its plain language, the CAA requires SIPs to include only those "emission limitations" and other control measures that are "necessary or appropriate" to comply with the Act.

EPA's role in implementing the NAAQS is secondary. EPA must approve a SIP if it meets the "applicable requirements" of the Act. CAA § 110(k)(3). The Supreme Court has held that EPA has "no authority to question the wisdom of a State's choices of emission limitations" where the SIP would result in "compliance with the [NAAQS]." *Train v. NRDC*, 421 U.S. 60, 79 (1975); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976). This Court has similarly construed CAA § 110 as erecting a statutory "federalism bar" that prohibits EPA from using the SIP process to force states to adopt specific control measures. *EME Homer City*, 696 F.3d at 30; *Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000); *Virginia v. EPA*, 108 F.3d 1397, 1408-09, 1410 (D.C. Cir.), *modified on other grounds*, 116 F.3d 499 (D.C. Cir. 1997).

This regime of "cooperative federalism" provides states with broad discretion in determining the control strategies for their SIPs.

B. EPA's SIP Call Authority

Consistent with EPA's limited role, Congress restricted the Agency's ability to force SIP revisions. Since CAA enactment, states must revise their SIPs:

> whenever the Administrator finds *on the basis of information available to the Administrator* that the plan is *substantially inadequate* to attain the [NAAQS] which it implements or to *otherwise comply with any additional requirements established under this chapter.*

CAA § 110(a)(2)(H)(ii) (emphases added). Thus, for EPA to force a SIP revision, the identified inadequacy must be "substantial," and the finding must be based on the "available information."

In 1990, Congress adopted another provision – CAA § 110(k) – establishing a more explicit process for states' SIP submissions and revisions, and for subsequent EPA approval. CAA § 110(k)(5) requires EPA to issue a SIP call:

> Whenever the Administrator finds that the applicable implementation plan for any area is *substantially inadequate* to attain or maintain the relevant national ambient air quality standard … or to otherwise comply with any *requirement of this chapter*, the Administrator shall require the State to revise the plan *as necessary* to correct such inadequacies.

(Emphases added.)

If a state fails to submit a timely, approvable revision to the SIP, EPA can promulgate a Federal Implementation Plan ("FIP"), but only as necessary to fill the

gap or correct the inadequacy. CAA §§ 110(c)(1), 302(y). A state that fails to make a timely submission also is subject to sanctions. *Id.* § 110(m).

C. States' Establishment of Control Measures and the Limitations of Technology

When adopting "emission limitations" and "other control measures," states identify sources with the potential to impact the NAAQS and identify available technologies and other measures to control their emissions. In some instances, the CAA specifically requires limits to be based on available technology, e.g., reasonably available control technology ("RACT") for sources in nonattainment areas under CAA § 172(c) and best available control technology ("BACT") for new and modified sources under CAA §§ 165(a)(4) and 169(3).

A long-standing concern is how emission limitations that are based on use of available technology address the fact that the same limitations may not be achievable when the source is starting up or shutting down. Sources have to shut down and start up at both regular and unpredictable intervals, whether at the end of a shift or production run, to permit preventive maintenance, or to reflect seasonal or other changes in demand. During these periods, emission limitations established to reflect what is achievable during steady-state operation may be unachievable or inappropriate.[3]

[3] This can occur because pollutant loading is either lower or higher in non-steady-state conditions. (For example, a limit requiring 99 percent reduction may

In addition, "even equipment that is properly designed and maintained can sometimes fail." Memorandum from S. Herman, to EPA Reg'l Adm'rs, Subject: State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown at 2 (Sept. 20, 1999) ("1999 SSM Guidance") (JA0399). A malfunction, which EPA has defined as the sudden and not reasonably preventable failure of process or control equipment to operate in a normal or usual manner, *see, e.g.,* 80 Fed. Reg. at 33,977, can occur for a variety of reasons, such as mechanical failure of a part; interruption of power, fuel, or material supply; unusual variation in process parameters; or many other causes.[4]

For decades, states have addressed these realities by excluding or exempting SSM events from standards applicable during other operations, or by providing a

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be unachievable if the uncontrolled emissions are already very low.) It can occur because the emission control equipment requires a certain temperature (e.g., as for electrostatic precipitators ("ESPs") and selective catalytic converters ("SCRs")) before it is effective, or a certain inlet flow is needed to minimize the possibility of explosion. *See, e.g.*, 80 Fed. Reg. 3090, 3095 (Jan. 21, 2015) (safety and corrosion problems if control device engaged during boiler startup); 79 Fed. Reg. 75,622, 75,647 (Dec. 18, 2014) (explaining variations in parameters that occur during startup and shutdown of brick kilns, and why certain emission control equipment cannot be operated during those periods).

[4] *See, e.g.*, 79 Fed. Reg. 36,880, 36,912 (June 30, 2014) (relief valves at refineries may release emissions because of "malfunction[s] such as a power failure or equipment failure, or other unexpected cause that requires immediate venting of gas from process equipment in order to avoid safety hazards or equipment damage."); 71 Fed. Reg. 39,259, 39,264 (July 12, 2006) (flares at refineries "are sometimes used as emergency devices…[and] it may be difficult to comply with these flare limits during malfunctions.").

defense to enforcement of exceedance of a standard during SSM periods. To ensure that sources take all reasonable steps to minimize emissions during those periods, states have adopted "general duty" and work practice standards requiring, among other things, use of good air pollution control practices to minimize emissions.

As EPA acknowledges, case law supports the logical principle that "technology-based standards should account for the practical realities of technology." 78 Fed. Reg. 12,460, 12,470 (Feb. 22, 2013).[5] *See also Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1293 (9th Cir. 1977) (in disapproving SIP and issuing FIP, "EPA cannot require a level of control technology that is technologically and economically infeasible"); *id.* at 1302 n.35 (imposing liability for ""violations"" beyond the control of source would "require more than available and feasible technology"). Courts have rejected EPA's claim that it could reflect the limits of

[5] Citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 398 (D.C. Cir. 1973) (""start-up' and 'upset' conditions, due to plant or emission device malfunction, is an inescapable aspect of industrial life, and…allowance must be made for such factors in the standards that are promulgated"); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973) ("variant provisions" to account for upsets "appear necessary to preserve the reasonableness of the standards as a whole").

control technology by promulgating standards that are not achievable during some periods of operation and exercising enforcement discretion.[6]

II. EPA's Past Treatment of SSM Periods in SIP Provisions

A. EPA's 1999 SSM Guidance

Over the years, EPA has issued a number of policy memoranda opining on how SIPs ought to address emissions during SSM periods. These views have changed over time. *See, e.g.*, Brief of Petitioners State of Florida, *et al.* ("State Petitioners' Brief") at 6-7. The most recent prior to this action was the 1999 SSM Guidance. While acknowledging that the guidance is not binding on anyone, including EPA,[7] EPA used it to inform states that, because of concerns that SSM exemptions might "aggravate" air quality, EPA viewed them as inconsistent with ensuring NAAQS compliance. 1999 SSM Guidance at 1 and Attachment p. 2 (JA0398, JA0403). Although EPA describes the guidance as reflecting the Agency's "longstanding interpretation of the CAA,"[8] it does not discuss any specific CAA provisions in detail, but simply refers to the "fundamental

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[6] *See, e.g., Portland Cement,* 486 F.2d at 399 n.91; *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1273-74 (9th Cir. 1977); *FMC Corp. v. Train,* 539 F.2d 973, 986 (4th Cir. 1976).

[7] *See* EPA Re-Issuance of Clarification Memorandum (Dec. 5, 2001) (JA0432).

[8] *See, e.g.*, 80 Fed. Reg. at 33,845, 33,849, 33,874.

requirement of attainment and maintenance of the NAAQS, or any other requirement of the Clean Air Act." 1999 SSM Guidance at 2 (JA0399).

As of 1999, EPA's primary SSM SIP "policies" were (1) that EPA would not approve "*automatic exemptions*" from "emission limitations" for SSM or any other reason, or "*director's discretion provisions,*" which EPA describes as authorizing state regulatory officials to grant exceptions to otherwise applicable requirements or excuse noncompliance, but (2) that EPA could approve "*affirmative defenses*" to civil penalties for exceedances due to SSM and also *"source category specific rules for startup and shutdown"* that provide, based on the technological limitations of control technology, that otherwise applicable emissions limitations "do not apply" during startup and shutdown periods. 1999 SSM Guidance Attachment pp. 4-6 (JA0405-07); 80 Fed. Reg. at 33,842, 33,977 (defining the first three terms) (emphases in original).

B. Application of the 1999 SSM Guidance

Until 2011, EPA applied its SSM policies only prospectively during actions on new SIP submissions. As a result, most of EPA's actions based on its self-proclaimed "statutory interpretations" occurred in the context of voluntarily submitted SIP revisions.

Some states responded to EPA's guidance by adopting and submitting for approval SIP provisions consistent with EPA's policies. In fact, a number of states

seeking changes to related provisions in their SIP yielded to EPA pressure and adopted the "affirmative defense" provisions endorsed by EPA in lieu of existing "automatic exemptions," in order to get their SIP revisions approved.

Texas is one state that adopted such an affirmative defense, and EPA approved that defense as applied to unplanned SSM events. 75 Fed. Reg. 68,989 (Nov. 10, 2010). Sierra Club and others challenged the approval, arguing that the affirmative defense violated the Act by limiting federal courts' authority to assess penalties for CAA violations and requiring courts and EPA to consider factors they contended were at odds with the penalty assessment criteria in CAA § 113(e). *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841, 851 (5th Cir. 2013). Based on the plain language of CAA § 113, the Fifth Circuit agreed with EPA that availability of an affirmative defense does not affect the district court's jurisdiction, "it simply provides a defense, under narrowly defined circumstances, if and when penalties are assessed." *Id.* at 853 n.9.[9]

At least one state requested approval of a source category specific exemption for startup and shutdown. EPA approved an Indiana provision excluding utility boilers equipped with an ESP from applicability of opacity limits during startup and shutdown, based on technical explanations and worst-case air quality modeling

[9] The Fifth Circuit was not the first court to uphold EPA's approval of such an "affirmative defense." *See* 78 Fed. Reg. at 12,470 (citing decisions of the Ninth and Tenth Circuits).

satisfying EPA's concerns about potential effects on the NAAQS. 67 Fed. Reg. 46,589, 46,592-93 (July 16, 2002).

The only time EPA, prior to this action, unilaterally applied its 1999 SSM Guidance to a previously approved SIP was in the state of Utah. In 2011, EPA called a SIP provision that authorized a state official to determine that emissions resulting from an "unavoidable breakdown" were not a violation, labeling it both an unlawful "automatic exemption" and an unlawful "director's discretion provision." 76 Fed. Reg. 21,639 (Apr. 18, 2011). The Tenth Circuit ultimately upheld EPA's action. *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1167-68 (10th Cir. 2012) ("*US Magnesium*").

III. The Current SIP Calls

EPA did not initiate these SIP Calls as a result of pressing concerns regarding the adequacy of the affected SIPs to achieve the NAAQS. EPA did so to settle a citizen suit alleging failure to act on an unrelated SIP submission within the statutory deadlines and to respond to a Sierra Club petition for rulemaking. 78 Fed. Reg. at 12,463-64.

The called SIP provisions are all designed to address the inability of sources to meet otherwise applicable emission control requirements under certain operating conditions, like SSM periods. All of the subject regulatory provisions were previously approved by EPA in notice and comment proceedings as compliant with

the requirements of the Act. Some were approved decades ago, others more recently.

All of the states subject to the SIP Calls have submitted (or, for revised NAAQS, will submit) demonstrations establishing that the SIP will result in attainment of the NAAQS. Consistent with EPA regulations and guidance, those demonstrations must include inventories of *actual* source emissions and consider how much sources' emissions will be reduced when emission limitations and other prescribed controls, including any exemptions from those, are implemented.[10] Many of the subject states already are achieving some or all of the NAAQS through their existing SIPs.[11]

A. Proposed SIP Calls

In its initial proposal, EPA applied some of the views in the 1999 SSM Guidance to find "substantially inadequate" to comply with "CAA requirements" those SIP provisions identified in Sierra Club's petition as constituting an "automatic exemption," or a "director's discretion provision." 78 Fed. Reg. at 12,489-90. EPA proposed for the first time to distinguish between "affirmative defenses" for exceedances caused by malfunction (which EPA proposed to find

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[10] *See* 40 C.F.R §§ 51.15, 51.50, 51.112 and pt. 51 Subpt. A, App. A, Table 2a (2014); *see also* UARG Comments at 21-24 (May 13, 2013) (JA0558-61).

[11] *See, e.g.*, Southern Company Comments at 51-54 (May 13, 2013) (JA0502-05).

consistent with the Act) and those for periods of startup and shutdown (which EPA proposed to find "substantially inadequate" to meet CAA requirements). *Id.* at 12,468-72. EPA also proposed to remove authorization for exemptions in the form of "source category specific rules for startup and shutdown" and re-label the criteria for such exemptions "appropriate considerations" for adopting alternative emission limitations. *Id.* at 12,477-78; UARG Comments at 42-44 (JA0565-67).

With respect to the change in treatment of "affirmative defenses," EPA reiterated its position that the defense was appropriate only for events that were "unavoidable" but for the first time asserted that, because startups are "normal operation[s]" that are "within the source's control," they are not unavoidable. 78 Fed. Reg. at 12,465, 12,471, 12,480. EPA proposed to require states to address startup and shutdown periods by developing alternative emission limitations rather than limiting applicability of otherwise applicable standards or authorizing an affirmative defense. *Id.* at 12,471.

B. Supplemental Proposal on "Affirmative Defenses"

During the SIP Call rulemaking, this Court decided a case addressing, among other things, a different "affirmative defense" provision EPA included in hazardous air pollutant ("HAP") emission standards adopted under CAA § 112. In *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) ("*2014 NRDC Decision*"), the Court held that EPA lacked authority under the

CAA to promulgate such a defense to standards under § 112, because Congress left EPA no gap to fill in that respect. *Id.* at 1064. In its decision, the Court expressly recognized the Fifth Circuit's prior decision upholding an affirmative defense to emission limitations adopted by Texas under CAA § 110 and made clear that it was not addressing whether SIPs can include such affirmative defenses. *Id.* at n.2.

Despite the Court's qualification, EPA reacted by reversing its position on the lawfulness of "affirmative defenses" in SIPs and proposing to issue new findings of "substantial inadequacy" to meet "CAA requirements" and SIP Calls for "affirmative defense" provisions for startup and shutdown in a number of states, including Texas and Mississippi, that EPA previously determined were lawful. 79 Fed. Reg. 55,920, 55,924-25 (Sept. 17, 2014).

C. Final Action

EPA finalized SIP Calls for nearly all of the provisions covered in its proposals, finding them "substantially inadequate" because they are no longer "facially []consistent" with the Agency's current interpretation of "CAA requirements." 80 Fed. Reg. at 33,851, 33,925-26, 33,934-35, 33,943, 33,959-74. Although EPA asserts that these inconsistencies are not "legal technicalities," *id.* at 33,850, the Agency also disclaims any obligation to make any specific factual findings, "provide[]…technical analysis to demonstrate that the SIP provision at

issue caused a specific environmental harm or undermined a specific enforcement case," or to otherwise "quantify" the inadequacy. *Id.* at 33,932-33, 33,936-37.

According to EPA, the previously-approved SIP provisions it characterized as "automatic exemptions" and "director's discretion provisions" are facially inconsistent with EPA's current interpretation of states' §110(a)(2)(A) authority and the definition of "emission limitation" in § 302(k). And, so-called "director's discretion provisions" further make provisions unenforceable and violate the procedural requirements for SIP adoption. *Id.* at 33,917-20. EPA separately found that all "affirmative defense" provisions eliminate the jurisdiction provided courts under § 113 to impose civil penalties for SIP violations. *Id.* at 33,851-52.

EPA's action relies heavily on the Agency's interpretation of the *2014 NRDC Decision* and another decision by this Court addressing application of HAP emission standards adopted by EPA under CAA § 112 during SSM periods. *See, e.g., id.* at 33,851-52, 33,889-98. In *Sierra Club v. EPA,* 551 F.3d 1019 (D.C. Cir. 2008) ("*2008 Sierra Club Decision*"), the Court determined that, for sources subject to those federal standards, there must be some "§ 112-compliant standard" applicable at all times and vacated the rule's longstanding provision exempting periods of SSM from otherwise applicable numerical HAP emission limitations. *Id.* at 1027.

EPA's action also includes a revised "SSM SIP Policy as of 2015," announcing the final, reviewable CAA interpretations upon which its findings and SIP Calls are based. 80 Fed. Reg. at 33,864, 33,976-982.

D. Consequences

EPA's SIP Calls have widespread impacts. They affect multiple rules in multiple states, *see id.* at 33,959-74, and require revision of those previously approved rules using notice and comment procedures, with subsequent submission to EPA of new requests for approval of those revised rules as adequate to comply with EPA's current view of the Act. CAA § 110(a)(2)(A) and (k)(l). If those submittals are not received by EPA by November 22, 2016, a "sanctions clock" starts (with the threat of withholding of highway funding). 80 Fed. Reg. at 33,849, 33,930. Upon submittal, EPA must review and approve or disapprove each submittal. CAA § 110(k)(1)-(4). If no submittal is made, EPA must promulgate a FIP. *Id.*

The number of resources (costs) necessary to respond to the SIP Calls is immense. In its evaluation of the impacts of the SIP Call, EPA prepared a memorandum estimating what it considers the "direct cost" of the action to states. EPA did not attempt to quantify any of its own costs or costs to industry. Incredibly, EPA estimates that each of the 45 jurisdictions required to respond to the SIP Calls will spend only 40 hours to do so, at a total cost of $158,220. *See*

Memorandum, "Estimate of Potential Direct Costs of SSM SIP Calls to Air Agencies" at 1-3 (Apr. 28, 2015) ("Cost Memo") (JA1107-09). EPA's estimates appear to assume that states will respond by simply taking ministerial action to remove the targeted provisions from their SIP and rely on the exercise of "enforcement discretion" to address the unavoidable violations that result. 80 Fed. Reg. at 33,980-81.

EPA did not attempt to determine any actual benefits from its action. Among the benefits EPA suggests "might" result are (1) increases in the accuracy of emission inventories by improving quantification of "actual emissions," and (2) "potential" decreases in emissions over existing provisions through imposition of "recent technological advances in control technology," and by "encourag[ing] sources to reduce emissions during startup and shutdown and to take steps to avoid malfunctions." *Id.* at 33,951, 33,955-56. EPA did not reference any facts showing that current state inventories are not accurate, that sources need further encouragement to reduce emissions during SSM periods, or that application of advances in control technology (which EPA does not identify) are needed to comply with the NAAQS.

STANDARD OF REVIEW

This Court must set aside final EPA action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; ... in excess of

statutory jurisdiction, authority, or limitations, or short of statutory right…." CAA § 307(d)(9). EPA's power is limited to the authority delegated by Congress. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). When EPA acts pursuant to Congressionally delegated authority, its statutory interpretations are subject to the two-step test in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984) ("*Chevron*"). Under step one, the court employs traditional means of statutory interpretation (the text, structure, purpose and history of the statute) to determine if the intent of Congress is clear. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004). If it is, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. Where the intent is not clear, step two of *Chevron* provides for judicial deference to any agency interpretation of the statute that is a "reasonable" one. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009), citing *Chevron*, 467 U.S. at 843-44.

EPA's action is arbitrary and capricious if the Agency fails to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1054-55, 1059 (D.C. Cir. 2001); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-37 (D.C. Cir. 1976).

SUMMARY OF ARGUMENT

The SIP Calls will force more than two-thirds of the states to reassess and revise SIPs previously approved by EPA and re-submit them for EPA approval. This broad mandate is not based on any new statutory requirement or on EPA's issuance of new regulations. Nor is it mandated by any court decision or tied to any demonstrated air quality problem. Rather, it is based solely on EPA's erroneous legal conclusions that isolated provisions of those SIPs, adopted by states in recognition of the limitations of even well-designed and -operated control technology, are "facially inconsistent" with the structure of the CAA.

In overruling state decisions about the control measures that are necessary or appropriate to meet CAA objectives, EPA adopted an interpretation of its SIP call authority that is contrary to the plain meaning of CAA § 110 and inconsistent with the statutory context and legislative history. EPA did not make a "finding," based on "available information," that the SSM provisions EPA identified render the SIP as a whole "substantially inadequate," or that revisions to the SIPs are "necessary to correct such inadequacies," as the statute requires.

Instead, EPA claimed it can issue SIP calls without even assessing the real-world impact of the particular provisions it deems "substantially inadequate," and without demonstrating that changing those provisions will result in any actual improvement in air quality or in the implementation of the Act. In fact, EPA tells

the states that they can write new, alternative emission limitations in their revised SIPs, or exercise their enforcement discretion, to provide essentially the same relief as the current SIP provisions that EPA says justify its SIP Calls. This elevation of form over substance is arbitrary and capricious, and it is directly contrary to Congress' intent that EPA merely set the goals, and the states determine the proper methods to achieve those goals.

To justify its SIP calls of so-called "exemptions," EPA relies largely on its evolving conclusion, never endorsed by any court, that there is an unstated "requirement" of the CAA that a state must subject any source it decides to regulate to emission limitations that (1) apply under all circumstances and (2) are contained in a single portion of the SIP. To get there, EPA adds its own gloss onto the legislative language, turning a definition into a legal requirement and foreclosing regulatory options clearly provided to the state by statute. The Agency improperly extends this Court's *2008 Sierra Club Decision* concerning EPA's obligation to promulgate emission standards for HAPs to the entirely separate and different authority of the state to choose the best combination of measures that the state determines is necessary or appropriate to attain the NAAQS and comply with other requirements established under the Act.

Similarly, with respect to "affirmative defenses," EPA concludes that a state's broad authority to determine the appropriate measures to comply with CAA

objectives does not allow a state to determine circumstances that warrant relieving a source from enforcement of emission limitations that cannot be met because of SSM events. Again, EPA cites a decision of this Court considering the very different statutory obligations of EPA when promulgating HAP emission standards, ignoring an on-point appellate decision holding that these "affirmative defense" provisions are in fact permitted by the CAA.

The only result of EPA's unreasonable interpretation of its SIP Call authority and its creation of CAA "requirements" where none exist is that states will have to re-write SIPs that are already doing what they are supposed to do – protecting and improving air quality – and sources will be subject to enforcement for emissions they could not reasonably avoid. This Court should reject EPA's unauthorized and unreasonable attempt to dictate the form of the requirements states choose for their SIPs and vacate the SIP Calls.

STANDING

Industry Petitioners are individual companies and groups with members that rely for compliance on the SIP provisions that EPA has mandated be removed.[12] Industry Petitioners have standing because they have suffered injury-in-fact that is redressable by the relief they seek. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

[12] *See, e.g.*, Public hearing testimony of NEDA/CAP (Mar. 12, 2013) (JA0442-51); *see also* UARG Comments at 1 (JA0541), SSM Coalition Comments at 1-2 (May 13, 2013) (JA0578-79).

560 (1992); *see, e.g.*, *West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). State Petitioners' challenges provide sufficient evidence that EPA's action is the cause of those injuries and that a favorable decision would alter states' actions and redress those harms. *See US Magnesium,* 690 F.3d 1157. Trade association Petitioners have standing on behalf of their members. *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

ARGUMENT

I. EPA Failed To Make the Showing Required To Issue a SIP Call

EPA identified several types of SIP provisions designed to address emissions associated with SSM events, each of which EPA asserts renders a SIP "substantially inadequate," justifying a SIP call. *Supra* pp. 15-16. EPA's conclusions are not based on information about interference with air quality goals, but on alleged inconsistency with "requirements" of the CAA that EPA has discovered since it approved the SIPs. As discussed in Parts II – III of this Argument and in State Petitioners' Brief, the identified provisions do not fail to meet any requirement of the Act. And, in any event, EPA has not met its burden to justify a SIP call.

A. EPA Applied an Unreasonable Interpretation of its Statutory SIP Call Authority

Congress set a high hurdle for SIP calls. *See supra* p. 5; *Virginia*, 108 F.3d 1397. However, because the Act does not specify what form EPA's findings must

take, EPA asserts that it need not connect its SIP Calls to any failure of the SIP to attain and maintain NAAQS, to meet a specified control technology requirement, or to provide for effective-in-fact enforcement. 80 Fed. Reg. at 33,932-35. In fact, according to EPA, it need not identify *any* adverse effects *at all* arising out of the called SIP provisions or project any improvements in air quality or enforcement that would result from issuing the SIP Calls. *See*, *e.g.*, *id.* at 33,931-34, 33,936-37. Based on this, in many instances EPA ignored states' long history of meeting the NAAQS with a SIP that includes the provisions EPA now asserts are inadequate.[13] *See*, *e.g.*, *id.* at 33,931-32, 33,944, 33,947; *cf.*, *e.g.*, North Carolina Comments at 1 (May 13, 2013) (JA0640); Colorado Comments at 3 (May 13, 2013) (JA0524).

EPA's interpretation of its authority is contrary to the statutory language and context, and is unreasonable.

1. Failing To Consider the SIP as a Whole

According to EPA, any SIP provision that is no longer "facially consistent" with EPA's current interpretations of the CAA's structure is "substantially inadequate." It does not matter what other provisions make up the complex set of

[13] There are many reasons why an SSM provision that authorizes, or withholds sanctions for, emissions that temporarily exceed those during other operations would not interfere with NAAQS attainment. *See, e.g.*, SSM Coalition Comments at 7-12 (JA0584-89); *cf.* State Petitioners' Brief at 15-17; *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1130 (10th Cir. 2009) ("*APS*") (higher emissions associated with malfunctions covered by affirmative defense would not interfere with attainment of NAAQS). EPA recognizes this. *See* 1999 SSM Guidance at 2, 3 n.2 (JA0399, JA0400).

emission limitations; other control measures, means, or techniques; compliance schedules; monitoring requirements; enforcement mechanisms; and other provisions that make up the SIP pursuant to CAA § 110(a)(2). In at least some instances, EPA based its findings on one isolated enforcement provision or emission limitation, when the SIP also contains one or more other enforcement mechanisms or control requirements that, together, constitute a comprehensive enforcement or continuous regulatory scheme. *See, e.g.*, North Carolina Comments at 2 (JA0641) ("For example EPA entirely ignored other provisions in North Carolina's air pollution rules that help provide assurances that air quality and emission standards will be achieved."). This piecemeal evaluation of a SIP's adequacy is exactly the opposite of what courts repeatedly have told EPA (and EPA has told the courts) the statute requires.

When EPA reviews a SIP submitted by a state, it is obligated to consider the SIP as a whole. EPA cannot object to particular provisions the state has chosen to include in its plan, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air...." *Train*, 421 U.S. at 79. EPA itself recently applied this principle, arguing that allowing SIPs to contain "affirmative defense" provisions was appropriate because that "supports the reasonableness of the SIP emission limitations as a whole." 78 Fed. Reg. at 12,470. Conversely, § 110 does "'not confer upon EPA the authority to

condition approval of [a state's] implementation plan…on the state's adoption of a specific control measure.'" *Michigan*, 213 F.3d at 687, quoting *Virginia*, 108 F.3d at 1408.

The directive to assess the SIP as a whole is even clearer in the case of SIP calls, where Congress required EPA to find that "the applicable implementation plan for an[] area" is substantially inadequate and, if so, to direct the state to "revise the plan as necessary to correct such inadequacies," rather than disapprove only a portion of the SIP. *See* CAA § 110(k)(5); *cf.* CAA § 110(k)(3). EPA has acknowledged previously that a SIP call decision takes more than just judging SIP provisions ineffective, because it requires "finding that the SIP as a whole is substantially inadequate," and "a SIP is a complex, multi-faceted set of obligations." *Ass'n of Irritated Residents v. EPA*, 686 F.3d 668, 677 (9th Cir. 2011).

Because EPA's interpretation of its SIP call authority ignores directives to consider the effectiveness of the SIP as a whole, that interpretation is unreasonable.[14]

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[14] Even the way EPA expresses the SIP Calls for each state reflects its myopic approach: "*these provisions* are substantially inadequate…and the EPA is thus issuing *a SIP call with respect to these provisions*." *See* 80 Fed. Reg. at 33,960 (Delaware) (emphases added). *Cf. id.* CAA § 110(k)(3) (EPA can disapprove a portion of a SIP *submittal*).

2. Failing To Give Meaning to the Words of the Statute

EPA's approach fails to give meaning to the higher threshold of "substantial inadequacy" that applies when EPA seeks to force a state to revise its already-approved SIP. *Compare* CAA § 110(k)(3) (EPA approval of initial plan or plan revision "if it meets all of the applicable requirements of" the CAA) *with* CAA § 110(k)(5) (issuance of SIP call if plan "is substantially inadequate to attain or maintain the relevant" NAAQS, mitigate adequately interstate pollutant transport, "or to otherwise comply with any requirement of" the CAA). In EPA's view, any single SIP provision that is inconsistent with EPA's view of broad directives of the CAA (e.g., the "enforcement structure" of the Act, *see* 80 Fed. Reg. at 33,858, 33,874) is enough. Because EPA claims there is no need for it to assess the effect of the identified provision on air quality or enforcement (*see supra* pp. 15-16; *infra* pp. 28-29), EPA's interpretation of its SIP Call authority, rather than being confined to some set of "substantial" deficiencies, is essentially limitless, bounded only by EPA's ability to argue that a SIP provision is "facially inconsistent" with EPA's current view of the implications of the CAA's structure.

An interpretation that fails to give meaning to all the words of the statute, especially words that create a special and differentiated duty for EPA in issuing SIP calls, is unreasonable and must be rejected. *Duncan* v. *Walker,* 533 U.S. 167, 174 (2001); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994); *see also*

Halverson v. Slater, 129 F.3d 180, 189 (D.C. Cir. 1997) (interpretation that deprives statutory provision of virtually all effect is unreasonable under *Chevron* step two).

EPA effectively reads other words out of the statute, as well. The Agency claims that the requirement of CAA § 110(a)(2)(H)(ii) for the Administrator to "find[]" substantial inadequacy "on the basis of information available to the Administrator" does not require EPA to make a factual finding or to consider any "information" at all about inadequacy, other than its own interpretation of what is consistent with the structure of the CAA.[15] And EPA claims that, despite Congress's use of the phrase "as necessary," in the requirement that the SIP call "shall require the State to revise the plan as necessary to correct such inadequacies," CAA § 110(k)(5), EPA is not required to make an analysis of necessity – i.e., what will happen if the plan is not revised or what will be accomplished if it is – at all. *See*, *e.g.*, 80 Fed. Reg. at 33,934.

EPA ignores both the ordinary and the logical meanings of "find," "substantially inadequate," "as necessary," and "on the basis of information available," adopting instead an interpretation that in effect means those words do

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[15] *See* 80 Fed. Reg. at 33,934. *Cf. Virginia*, 108 F.3d 1397, rejecting EPA assertion that, based on general principles rather than a specific factual showing, a SIP was substantially inadequate to achieve the NAAQS: "In the absence of applicable modeling, no such agency finding could be made. Thus, there is no existing basis for these SIP calls." *Id.* at 1414-15.

not restrict at all EPA's ability to force states to go through the burdensome and time-consuming process of SIP revisions.[16]

3. Ignoring the Statutory Context

Words of the statute must be interpreted in context, especially when interpreting the CAA. *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014); *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575-76 (2007). Congress granted states the primary role and great flexibility in deciding the best set of mechanisms to meet air quality goals, and authorized EPA to require states to revise their SIPs only under limited circumstances. *See supra* pp. 3-6. In that context, it is unreasonable to interpret the "substantially inadequate" requirement to be divorced from any assessment of air quality or, indeed, any measure of significance at all.

CAA § 110 gives states "the power to determine which sources would be burdened by regulation and to what extent." *Union Elec.*, 427 U.S. at 269; *id.* at 266 ("So long as the national standards are met, the State may select whatever mix of control devices it desires … and industries with particular economic or technological problems may seek special treatment in the plan itself."). EPA cannot condition its approval of a SIP "on the state's adoption of a specific control measure." *Virginia*, 108 F.3d at 1408. EPA has cited no requirement of the CAA

[16] *See* State Petitioners' Brief at 21; SSM Coalition Comments at 25-29 (JA0592-96).

that would support the proposition that a state may, on the one hand, exempt a source from emission limitations altogether, but may not, on the other hand, apply certain emission limitations only during a particular phase of source operation.[17]

EPA's interpretation of its SIP call authority fails to reflect the statutory allocation of decision-making authority between the state and EPA and is inconsistent with the CAA's system of cooperative federalism. *See supra* pp. 3-6; State Petitioners' Brief.

B. *US Magnesium* Does Not Save EPA's Interpretation of Its SIP Call Authority

As noted above, EPA's interpretation of its authority to issue SIP calls is inconsistent with extensive case law describing EPA's limited role in the SIP process and lack of authority to impose on states its preferred approach for meeting NAAQS and other CAA requirements.

As support, EPA cites *US Magnesium*, 690 F.3d 1157, which upheld an EPA SIP call for inconsistency with "EPA's understanding of the CAA," despite EPA's failure to make any "specific factual finding." *Id.* at 1168.

Several facts distinguish that case, and it is not controlling here. First, the state did not challenge EPA's determination that the SIP was substantially

[17] EPA's arrogation of the states' authority is most extreme in the case of malfunctions, where EPA suggests that the state may only adopt alternative emission limitations if "a given type of malfunction is so…foreseen that a state considers it a normal mode of operation" – a criterion EPA does not even attempt to tie to a specific requirement of the CAA. *See* 80 Fed. Reg. at 33,979.

inadequate, unlike here. Second, although EPA asserted it did not need to make a factual showing that the SIP provision in question resulted in NAAQS violations, the Agency did in fact provide information about the magnitude of emissions that could be released under the SIP provision in question. *Id.* at 1163. Third, the Tenth Circuit ignored legislative history concerning EPA's authority to issue SIP calls, on the mistaken impression that the legislative history pre-dated statutory language establishing EPA's SIP call authority.[18]

That legislative history is further support that Congress did not intend the severe remedy of a SIP call to be based on theoretical inconsistencies with CAA requirements. In considering the 1970 CAA Amendments, the Senate Committee on Public Works described the legislation as follows:

> Whenever the Secretary or his representative finds from *new information developed after a plan is approved* that the plan is not or will not be adequate to achieve promulgated ambient air

[18] The opinion declined to consider the legislative history of the 1970 CAA, on the grounds that CAA § 110(k)(5) was adopted in 1990. *US Magnesium,* 690 F.3d at 1167. The requirement that a state revise its SIP whenever the Administrator makes a finding, on the basis of available information, that the SIP is substantially inadequate has been in CAA § 110(a)(2)(H)(ii), unchanged in relevant part, since the CAA was enacted in 1970. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 108(a)(6), 91 Stat. 685, 693-94 amending CAA § 110(a)(2)(H)(ii) in minor ways not relevant to the issue). Although § 110(k)(5) was not adopted until 1990, it in no way supplants, but rather "complements" § 110(a)(2)(H)(ii) by making clear that, when EPA makes such a finding, it may only call for revision "'as necessary'" to correct the identified problem. *Virginia*, 108 F.3d at 1410.

> quality standards he must notify the appropriate States and *give them an opportunity to respond to the new information.*

S. Rep. No. 91-1196 at 55-56 (1970) *reprinted in* 1 Comm. on Public Works, A Legislative History of the Clean Air Amendments of 1970 (1974) (emphases added); *see also id.* at 14 ("Whenever *information reveals* that an approved or promulgated implementation plan is inadequate, the Secretary would be required to act to revise such plan.") (emphasis added).

In addition to ignoring this important legislative history, the *US Magnesium* opinion does not address many of the arguments and citations presented in this brief. It is not binding on this Court with respect to these SIP Calls. Instead, the Court should follow the more-extensive reasoning the Fifth Circuit used to reject EPA's objections to "director's discretion" provisions and other "drafting" issues. *Texas v. EPA*, 690 F.3d 670 (5th Cir. 2012) (applying the less-stringent "interfere with any applicable requirement" standard for SIP revisions in CAA § 110(*l*)). There, the Court explained that the applicable requirement was "that Texas define enforceable emission limitations and control measures," rejecting EPA's objections to the SIP revision "based, in essence, on the Agency's preference for a different drafting style, instead of the standards Congress provided in the CAA…." *Id.* at 682, 679; *see also id.* at 684 ("When the EPA rejects a provision on the premise of enforceability, we must inquire whether the EPA's determination constitutes an impermissible control-specific means or a permissible end goal.").

C. The SIP Calls Are an Arbitrary and Capricious Exercise of EPA's SIP Call Authority

Even if EPA correctly interpreted the nature and scope of its authority to issue SIP calls, the SIP Calls in this case must be rejected because of EPA's failure to consider adequately, if at all, the burdens and benefits of its regulatory action. As explained at pages 15-16, 28-29, *supra*, because it concluded it was not *required* to, EPA did not make any attempt to tie a SIP Call to correction of any specific pollution control problem, or even to any projected improvements. And although EPA did estimate what it called the "direct costs" of the SIP Calls, by that it meant only the ministerial costs of removing the identified provisions from the state regulations. The Agency made no assessment of the costs for the states to revise the other portions of their SIPs that refer to the identified provisions and to develop new emission limitations to apply during SSM periods.[19] EPA also intentionally ignored the costs that changes in state regulations mandated by the SIP Calls would impose on industry. Thus, EPA deliberately ignored both the benefits (if any) and most of the costs of the rulemaking.

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[19] *See* 80 Fed. Reg. at 33,883-84; pp. 17-18, *supra*. EPA recognized states would need to do such additional work as a result of the SIP Calls, *see*, *e.g.*, 80 Fed. Reg. at 33,898, but chose to ignore those costs, simply because "EPA's action…would leave to states the choice of how to revise the SIP provision in question…and of determining…which of several lawful approaches to the treatment of excess emissions during SSM events will be applied to particular sources." *Id.* at 33,883; State Petitioners' Brief at 21.

This failure is similar to the one the Supreme Court identified in *Michigan v. EPA*, 135 S. Ct. 2699 (2015). There, the Court rejected EPA's argument that it could determine, under CAA § 112(n), whether it was "appropriate and necessary" to regulate HAPs from power plants under CAA § 112, without giving any consideration to the costs and benefits of doing so. The Court found that even though there was no explicit statutory mandate to consider costs and benefits, issuing a rule without doing so was arbitrary and capricious. *Id.* at 2702, 2705. EPA does not claim here that it is precluded from analyzing the costs and benefits of issuing the SIP Calls. *See, e.g.*, 80 Fed. Reg. at 33,865, 33,883. So for the same reason, the SIP Calls are arbitrary and capricious.[20]

Moreover, a proper assessment of the SIP Calls' costs and benefits would show that EPA's action is unjustified. Eliminating SIP provisions that recognize sources may be unable to meet limitations based on steady-state operation during startup or shutdown will not make those limitations suddenly achievable. In fact, EPA recognizes states may have to create alternative emission limitations for startup and shutdown periods, i.e., changing the form of regulations that recognize

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[20] *See also Michigan*, 213 F.3d at 677-78 (questioning whether emissions could be determined "significant" without considering costs of eliminating them); *cf. Entergy*, 556 U.S. at 234-35 (Breyer, J., concurring in part and dissenting in part) (EPA always took the position that, although Clean Water Act provision did not require analysis of costs and benefits, it would not be "reasonable" to interpret statute to require technology whose cost is wholly disproportionate to environmental benefit gained).

limitations of technology during startup and shutdown events. *See*, *e.g.*, 80 Fed. Reg. at 33,898; State Petitioners' Brief at 21. Likewise, removing SIP provisions that give sources relief when they exceed limitations, due to malfunctions, will not stop those unavoidable emissions from occurring.[21] EPA concedes that it cannot even "estimate" any actual emission reductions from the SIP Calls. 79 Fed. Reg. at 55,927.

Ignoring those realities is arbitrary and capricious because it: (1) imposes a regulatory burden without justification,[22] (2) irrationally asserts that the SIP is substantially inadequate because it contains a provision the removal of which has not been shown to have any substantial beneficial effect, and (3) penalizes sources for emissions they cannot reasonably avoid, something both EPA and the courts have said consistently is inappropriate and unreasonable. *See supra* pp. 8-9, 17-18.

EPA also incorrectly claims that requiring states to excise the identified SSM-related provisions from the SIPs is necessary because otherwise states would be assuming, inaccurately, that a source's emissions would always be controlled at

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[21] *See*, *e.g.*, 73 Fed. Reg. 21,418, 21,435-36 (Apr. 21, 2008) ("the elements of the affirmative defense delineated in the 1999 [SSM Guidance]…provide a very significant incentive for facilities to do all they can to comply with their emission limits"; incentives may not be significantly greater using enforcement discretion alone); *see also Luminant*, 714 F.3d at 854 (EPA says its approval of "the affirmative defense for unplanned SSM activity will not serve as a disincentive for companies to avoid excess emissions.").

[22] *Cf. Ala. Power v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979) (departing from literal application of law to avoid "pointless expenditures of effort").

the level of the numerical limitation derived for steady-state operations, when the state and EPA assess whether the SIP is and will be sufficient to meet air quality goals. *See*, *e.g.*, 80 Fed. Reg. at 33,950-51. As explained at page 13, *supra*, and in greater detail in UARG Comments at 75-77 (JA0572-74), that assertion is incorrect. EPA already requires states to take into account, in their emission projections, the fact that sources may be unable to meet those limitations a certain portion of the time.[23] Implying that somehow states' and EPA's ability to project emissions will be improved once the SSM provisions identified in the SIP Calls are removed/replaced is, at best, the kind of "speculative factual assertion" that renders the action arbitrary and capricious. *See Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1266 (D.C. Cir. 1994).

II. EPA's Prohibition on So-Called "Exemptions" from Emission Limitations Is Not Supported

Congress provided states discretion to conclude that application of emission limitations either are not "necessary," or are not "appropriate," for particular sources or periods of source operation, and to otherwise decide how best to structure any applicable control requirements. CAA § 110(a)(2)(A). Consistent with that authority, many SIPs include provisions that exclude certain operating

[23] *See also* State Petitioners' Brief at 16; *cf.* 80 Fed. Reg. at 33,978 (emission standards that include an SSM exemption can be used by state "as a source of emission reductions that may be taken into account for SIP planning purposes in emissions inventories or attainment demonstrations").

conditions (e.g., SSM and other periods) from application of a numerical emission limitation. 80 Fed. Reg. at 33,957. Some provisions impose conditions, such as time limitations or requirements to minimize emissions, as a prerequisite to demonstrating that a numeric emission limitation does not apply, or that a violation has not occurred. Others require a state official to make a determination before the provision applies (what EPA calls "director's discretion" provisions). *Id.* at 33,977-78. Although these provisions take different forms,[24] in this single action, EPA deems them all unlawful "exemptions."

According to EPA, Congress' definition of "emission limitation" in CAA § 302(k) as a requirement that reduces emissions "on a continuous basis" establishes a mandate for continuous application of some "emission limitation" at all times. *Id.* at 33,889, 33,981. Because SIPs may impose "emission limitations" under CAA § 110(a)(2)(A), EPA asserts that once a state decides to regulate a source or source category in its SIP using a requirement that otherwise looks like an "emission limitation" (e.g., limits the quantity, rate, or concentration of emissions), the SIP must apply some "emission limitation" "at all times," including during SSM periods. *Id.* at 33,977. As support, EPA points to this Court's *2008 Sierra Club Decision*, applying that definition in the context of EPA's regulation of HAPs under CAA § 112. EPA further asserts that a SIP's imposition of a *separate*

[24] *See, e.g.*, 80 Fed. Reg. at 33,913, 33,957-74, 33,978.

requirement to minimize emissions or to comply with good air pollution control practices is insufficient to achieve "at all times" control. *Id.* at 33,903.

EPA misreads the Act. The CAA does not mandate that *states* use any specific language or structure when imposing additional SIP controls that apply during periods when a particular numerical standard does not. Moreover, CAA § 302(k) does not prohibit states from limiting the applicability of an emission limitation. Rather, EPA's SIP Calls are an attempt to unlawfully impose on states its preferred method for NAAQS compliance – i.e., regulation of sources "at all times" through a series of self-contained "emission limitations."

A. "General Duty" Provisions and "Work Practice" Conditions on Applicability Provide "At All Times" Control

Congress specifically included "design, equipment, work practice or operational standard[s]" in the list of requirements that qualify as an "emission limitation" under CAA § 302(k). Many of the SIPs with what EPA calls unlawful "exemptions" from "emission limitations" include "general duty" requirements that impose "work practice or operational" requirements to minimize emissions either at all times, or as a prerequisite to an exception to application of a numeric "emission limitation."[25] These requirements ensure that emission reduction requirements apply to all periods of source operations, and thus already satisfy

[25] *See, e.g.*, UARG Comments at 54-56 (JA0568-70).

EPA's demand for "continuously applicable emission limitation." EPA summarily rejects them all.

EPA asserts that in order for any provision to satisfy § 302(k), it must be "part of or explicitly cross-referenced" in the other "emission limitations" that do not apply at all times. 80 Fed. Reg. at 33,890, 33,903-904, 33,943. Concluding that the SIPs' existing requirements are deficient in that respect, EPA summarily rejects all "general duty" provisions as "unrelated" generic control requirements and not a component of a "continuously applicable emission limitation." *Id.* at 33,890, 33,943, 33,979; *see also* State Petitioners' Brief at 22-23. EPA similarly rejects other prerequisite work practice conditions because EPA says they are "elements of an exemption…rather than components of the emission limitation itself." 80 Fed. Reg. at 33,903.

EPA's interpretation and assessment of the current SIPs is unreasonable. EPA cites no provision of the Act requiring that all controls on a source or source category be expressed as part of the same section of a state's regulations or explicitly cross-referenced, or any provision of the Act prohibiting expression of a work practice standard as a pre-requisite to another standard's non-applicability (e.g., as part of an exception).

EPA also has not identified any specific substantive deficiency in these state-specific requirements. Although EPA says that any "general duty" or work

practice standard also would have to be consistent with the applicable stringency requirements for the type of SIP provision at issue (e.g., reflect RACT), *id.* at 33,890, 33,979-80, EPA's SIP Calls did not identify *any specific provision* that was subject to, much less failed to meet, such a statutory requirement. EPA's concern is mere hypothesis. Absent an applicable statutory requirement, SIP provisions are not subject to *any* minimum stringency requirement under CAA § 110, and EPA has cited none. *See, e.g., Citizens for a Better Env't v. EPA*, 649 F.2d 522, 528-29 (7th Cir. 1981) (upholding a state's requirement for an "operating plan[]" to reduce fugitive emissions as clearly falling within the meaning of ""any requirement relating to the operation"" under § 302(k), despite the lack of requirement for state approval of the plan). In fact, EPA's own "SSM SIP Policy as of 2015" endorses use of similar provisions requiring sources to "minimize" emission in its listed considerations for source category-specific rules for startup and shutdown. 80 Fed. Reg. at 33,980.

B. EPA's Mandate for "Continuous" Application of SIP "Emission Limitations" Is Based on an Incorrect and Unreasonable Reading of Relevant Statutory Provisions

In addition to relying on non-existent requirements regarding the manner in which SIPs can impose "at all times" controls under EPA's view of § 302(k), EPA's SIP Calls suffer an even more fundamental flaw – misinterpretation of both CAA §§ 302(k) and 110(a)(2)(A). Although EPA has stated a preference for

application of SIP "emission limitations" at all times of source operation, § 302(k) imposes no such requirement on SIPs.

1. EPA Misreads the Definition of "Emission Limitation"

a. The Plain Language

By its plain language, CAA § 302(k) requires only that where Congress has mandated use of an "emission limitation" or standard that singular requirement must provide for emission reductions that are "continuous." In contrast, EPA reads the provision to require that if a state limits applicability of one "continuous" requirement to only certain source operations, the state must adopt *other* "continuous" requirements that would apply to all other periods of operation, including SSM. EPA asserts that its reading is consistent with the "plain and unambiguous" meaning of "continuous" as "uninterrupted." 80 Fed. Reg. at 33,901. To describe this requirement, EPA coins its own terms, calling it a "continuously applicable emission limitation" or an "overarching emission limitation." *See, e.g., id.* at 33,842, 33,890, 33,895, 33,903, 33,977.

CAA § 302(k) defines "emission limitation" or "emission standard" under the Act to mean:

> *a requirement* established by the State or the Administrator *which limits* the quantity, rate, or concentration of *emissions* of air pollutants *on a continuous basis,* including any requirement relating to the operation or maintenance of a source to assure *continuous emission reduction*, and any design,

> equipment, work practice or operational standard promulgated under this chapter.

(Emphases added.) Notably, the provision says nothing about the applicability of emission limitations,[26] or about stringing together multiple requirements, including work practice or operational standards to form some "continuously applicable emission limitation" or "overarching" requirement. Nonetheless, EPA reads the definition to impose such requirements.

EPA's reading ignores an important point. An "emission limitation" can impose a requirement for uninterrupted emission reductions without that requirement *applying* to every period of source operation. For example, a "requirement" that imposes a particular level of uninterrupted emission reduction only when a source is operating in a certain manner does not cease to require "continuous" reduction as that term is ordinarily used simply because it does not apply to the source's other periods of operations. Something can be "continuous" over some period of time or condition, but not necessarily *all* periods of time.

In fact, that is how EPA itself has used the term.[27] For example, in a 1982 memorandum on the meaning of "continuous compliance," EPA explained:

> sources are required to meet, *without interruption*, all applicable emission limitations and other control

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[26] That is dictated by other CAA provisions – like §§ 110, 111, and 112.

[27] *See* UARG Comments at 16-20 (JA0553-57).

> requirements, *unless such limitations specifically provide otherwise*.

Memorandum from K. Bennett, EPA Assistant Adm'r, to Reg'l Air Dirs., Subject: Definition of "Continuous Compliance" and Enforcement of O&M Violations at 1 (June 21, 1982) (emphases added) (JA0557). Up until now, EPA relied on this interpretation of the word "continuous" as allowing exceptions to the applicability of "emission limitations" on many occasions, including when it adopted and defended the lawfulness of its "credible evidence" rule in 1997. 62 Fed. Reg. 8314, 8315 ("EPA's position continues to be that an emission standard requires *continuous* compliance *unless the emission standard specifically provides otherwise*."), 8323-24 ("EPA and the courts have long held that emission limits must be complied with continuously, consistent with any associated averaging periods, *except where a particular limit provides otherwise*.") (Feb. 24, 1997) (emphases added); *Clean Air Implementation Project v. EPA*, 150 F.3d 1200 (D.C. Cir. 1998) (applying a definition of "continuous" emission limitations that authorized exceptions to the applicability of those standards).

b. The Legislative History

The legislative history makes clear that "continuous" does not mean "over all periods of operations." And, it does not support EPA's argument that Congress intended the definition to prohibit states from taking into account the inherent

technological limits of control technology that otherwise provides "continuous" emission reductions.

As originally enacted, the CAA required SIPs to include "*emission limitations…and such other measures as may be necessary* to insure attainment and maintenance of [the NAAQS]." Clean Air Amendments of 1970, Pub. L. No. 91-604, § 110(a)(2)(B), 84 Stat. 1676, 1680 ("1970 CAA") (emphasis added). In the absence of a statutory definition, EPA interpreted the term "emission limitation" to require emission reductions through the application of some measure of "constant emission controls," like a scrubber, that actually *reduce* emissions, rather than merely *dispersing* them. *See, e.g., Kennecott Copper Corp. v. Train,* 526 F.2d 1149, 1151-53 (9th Cir. 1975). EPA interpreted "other measures" to include intermittent or supplemental controls like air dispersion, dilution, or reduction in production levels when air quality was poor, which could be used only if an economically feasible *constant emission control* technology *was not available*. *Id.* at 1153, 1155. Between 1970 and 1977, EPA used this interpretation of CAA § 110(a)(2)(B) to authorize states' use of "other measures" when states could make that demonstration. *See, e.g., Natural Res. Def. Council v. EPA,* 489 F.2d 390, 410 (5th Cir. 1974), *rev'd on other grounds sub nom. Train v. Natural Res. Def. Council,* 421 U.S. 60 (1975); *Big Rivers Elec. Corp. v. EPA,* 523 F.2d 16 (6th Cir. 1975).

With respect to the applicability of "emission limitations," in its guidance to states for SIPs and implementation of other provisions of the Act, EPA interpreted the term "emission limitation" in CAA § 110(a) to include requirements that did not apply to periods when the available controls were not expected to operate at their full efficiency, like during SSM periods. *See* UARG Comments at 7-9 (JA0544-46). During that same period of SIP implementation, this Court found such accommodations an appropriate way to ensure the achievability of "emission limitations" established by EPA, where EPA had not otherwise taken those periods into account in standard setting. *See Portland Cement,* 486 F.2d at 398-99, 402; *Essex Chemical,* 486 F.2d at 432-33.

EPA's interpretation of "other control measures" in § 110 drew Congress' attention which, during consideration of the 1977 CAA amendments, considered a number of "fundamental policy objections" to the use of "tall stacks" and "intermittent" (or supplemental) controls, which it defined as:

> techniques which seek to reduce concentrations of pollutants *not by reducing the amounts of pollutants emitted into the air*, but *rather by relying on the dispersion of pollutants* throughout the [] atmosphere.

H.R. Rep. No. 95-294, at 81, 82 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1159, 1160 (emphases added). To address its concerns with use of the "intermittent" controls (defined as *dispersion* techniques), Congress added § 302(k) and explained:

> By defining the terms 'emission limitation,' 'emission standard,' and 'standard of performance,' the committee has made clear that *constant or continuous means* of reducing emissions must be used *to meet these requirements*. By the *same token, intermittent or supplemental controls* or other *temporary, periodic, or limited systems of control* would not be permitted as a *final* means of compliance.

See H.R. Rep. No. 95-294, at 92 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1170 (emphases added).

Congress also adopted CAA § 123, which made clear that the degree of "emission limitation" specified in a SIP *may not* be affected by "stack height" or "other dispersion technique," including "any intermittent or supplemental control of air pollutants varying with atmospheric conditions." CAA § 123(a), (b). *See also Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 434 n.54 (D.C. Cir. 1980) ("The 'intermittent' controls that concerned Congress were any of those which entailed temporary reductions in emissions when weather conditions were poor."). Congress's acceptance of EPA's interpretation of "emission limitation" as requiring use of control technology that actually *reduce emissions* rather than *disperse* them, and adoption of § 123, had the effect of prohibiting EPA from adopting, or allowing states to adopt, new rules that authorize sources to use techniques that vary their level of emission control *based on air quality*.

Significantly, nothing about Congress's description of its intent or use of the term "continuous" suggests that it was directed at EPA's and states' practice of

defining the *applicability* of "emission limitations" that *are* based on constant control technology. In this sense, the word "continuous" has "an essentially negative definition: any *control technique* is continuous which does not *operate* on an intermittent basis." *Kamp v. Hernandez,* 752 F.2d 1444, 1453 (9th Cir. 1985) (emphasis added). Something is "intermittent" if it "com[es] and go[es] at intervals." Merriam-Webster Dictionary, http://www.merriam-webster.com. Limiting the applicability of such emission limitations to periods when the specified constant emission controls are capable of operating at their full efficiency is not the same as authorizing use of an "intermittent" control that comes and goes. SIP limits on applicability of "emission limitations" merely conform the standards to the technological limitations of the available controls.

2. The *2008 Sierra Club Decision* Is Not Controlling

The *2008 Sierra Club Decision* does not support EPA's current interpretation of the Act. In that case, the Court reviewed SSM exemptions in "emission standards" promulgated *by EPA* to control HAPs under CAA § 112 and determined that "when sections 112 and 302(k) are read together" Congress required that there be "continuous section 112-compliant standards" (i.e., that there be some § 112-compliant standard applicable to § 112-affected sources at all times). 551 F.3d at 1027.

CAA § 112(d) mandates establishment of "emission standards" consistent with "the maximum degree of reduction in emissions," using controls referred to as "maximum achievable control technology" ("MACT"). *Id.* at 1021. If EPA determines that it is not "feasible" to "prescribe or enforce" such standards, Congress further *required* EPA to prescribe work practice standards under CAA § 112(h) in their place. *Id.* at 1028. Reading these requirements together with the § 302(k) mandate that "emission standards" be based on continuous or constant control technology, the Court found no *EPA* authority to address SSM periods other than through CAA § 112(d) or a finding of "infeasibility" under § 112(h). And, because EPA conceded that it had not based the "general duty" work practice standard that applied during SSM periods on either provision, the Court found that sources covered by MACT standards would not be subject to "112-compliant" emission limitations at all times, and therefore the SSM exemptions in that § 112 rule were not authorized. *Id.*

However, that case turned on the "specific arguments that each of the litigants raised in that case." 80 Fed. Reg. at 33,893. Because EPA defended its SSM exemptions in the litigation based solely on the argument that the "general duty" fell within the definition of "emission limitation," that is the issue upon which the Court ruled. *Id.* Although the Court quoted § 302(k), including the requirement for "continuous reduction," the Court did so primarily to determine

whether the provision required that the *same* emission limit apply at all times, and found that it did not. *2008 Sierra Club Decision*, 551 F.3d at 1027. And, when the Court considered whether EPA had discretion to create exceptions to the applicability of § 112 "emission standards," the Court referred only to the "text, history and structure of *section 112*," and not to its finding of some general prohibition on such discretion in § 302(k). *Id.* at 1028.

While conceding that the *2008 Sierra Club Decision* does not apply directly to SIPs, EPA nonetheless maintains that its reasoning should control interpretation of § 110(a)(2)(A). It should not. CAA § 110(a)(2)(A) is very different from § 112. Section 112 prescribes a particular level of emission control for any listed source category, and requires use of work practice standards when those emission standards are "not feasible." By contrast, § 110(a)(2)(A) provides states with broad discretion to regulate through "emission limitations" and "other control measures" that the state deems "necessary or appropriate" and, unlike § 112, does not specify whether or how to regulate sources when a particular "emission limitation" is not feasible. Moreover, regardless of what "emission limitation" means, Congress explicitly provided states discretion to impose them only as "necessary or appropriate" to meet some other applicable requirement of the CAA. CAA § 110(a)(2)(A).

3. EPA Further Misreads the Required SIP Elements in CAA § 110(a)(2)(A)

Because the CAA § 302(k) definition of "emission limitation" does not by itself establish any "CAA requirement" for continuous *application* of "emission limitations," the simple reference to emission limitations in § 110(a)(2)(A) cannot either. The term "emission limitation" means the same thing it did when EPA first interpreted it in the 1970s to require use of some measure of "constant emission control" that actually *reduces*, rather than disperses, emissions. In § 302(k), Congress endorsed that interpretation. *See discussion supra* pp. 44-46. Many control devices, like scrubbers, ESPs, and SCR, that are subject to technological limitations during SSM periods provide constant or "continuous" emission reductions consistent with the definition of "emission limitation" when they are operating properly.

EPA attempts to dismiss the "necessary or appropriate" language by interpreting the subsequent phrase "requirement of this chapter" to include the definition of "emission limitation." 80 Fed. Reg. at 33,902. Whatever the definition in § 302(k) means, it is not a standalone "requirement" of the Act. It simply gives meaning to terms used in other CAA sections, which may themselves establish a CAA requirement.

As far as how the term applies in CAA § 110(a)(2)(A), even under *Chevron's* deferential *step two* standard, context counts. *Utility Air Regulatory*

Grp., 134 S. Ct. at 2442. Congress intended to endow states with significant discretion regarding not only *whether* but *how* to regulate sources. *See supra* p. 4. EPA's interpretation divests states of that discretion. It also interferes with states' obligation to ensure that the resulting control requirements are achievable.[28]

Although EPA has through its prior non-binding SSM SIP guidance expressed a clear preference for use of *at all times* control, its preferences have no place in SIP review. *See Virginia,* 108 F.3d at 1410. EPA's interpretation would, by depriving states' the choice of not applying emission limitations to some or all sources during SSM (or other) periods, mandate that states impose a particular control measure or mix of controls, something Congress otherwise declined to do, or authorize EPA to do. *Id.* If Congress did not want states to have discretion to determine how "emission limitations" were applied in SIPs, it could have adopted more prescriptive measures or prohibitions – like it did in CAA § 112.

The "necessary or appropriate" language in CAA § 110(a)(2)(A) recognizes that states are in the best position to determine whether emissions during SSM (or other) periods are significant, and whether they can be effectively controlled.

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[28] For example, where the Act placed some limit on states' discretion to determine which sources should be controlled and how (e.g., by specifying use of RACT, BACT, and lowest achievable emission rate), Congress also required that those controls be "available" and that the resulting emission limitation be "achievable." SSM exceptions can make an otherwise unachievable standard achievable. *See, e.g., supra* p. 8.

States also are in the best position to determine how best to articulate the scope of the emission limitations they adopt. Whether a state defines its exceptions in terms of when an "emission limitation" applies, or adopts provisions establishing conditions under which exceedance of an "emission limitation" would not constitute a "violation," the results are the same.

III. EPA's Blanket Prohibition of "Affirmative Defenses" Is Not Supported by the Act or Case Law

EPA found over a dozen SIPs "substantially inadequate" because they provide source operators an "affirmative defense" in an enforcement action for violation of an emission limitation resulting from an SSM event. Under such an "affirmative defense," the SIP describes criteria under which certain judicial sanctions (typically, civil penalties) should not be assessed, i.e., the violation did not result from inadequate equipment or poor operation, and the operator acted promptly to minimize the magnitude and duration of excess emissions.

EPA relies exclusively on the *2014 NRDC Decision,* in which this Court held that the Act did not "give *EPA* authority to create an affirmative defense" to civil penalties in a nationwide regulation issued under CAA § 112 that limits HAP emissions from cement kilns. 749 F.3d at 1064 (emphasis added). The Court expressly did not address whether an affirmative defense may be allowed in a SIP. *Id.* at 1064 n.2. Nevertheless, EPA contends that "[t]he reasoning" in the *2014 NRDC Decision*, "logically extended to SIP provisions, indicates that neither states

nor the EPA have authority to alter either the rights of other parties to seek relief or the jurisdiction of federal courts to impose relief for violations of CAA requirements in SIPs." 80 Fed. Reg. at 33,853.

EPA is wrong. The reasoning in the *2014 NRDC Decision* is *not* logically extended to SIPs. Given the unique authorities granted to states under the CAA, SIP provisions and § 112 HAP standards are fundamentally different. Whereas EPA has no express delegation of authority in the Act to tailor the enforcement of § 112 standards, states, on the other hand, are expressly given the authority to determine the "necessary or appropriate" "enforceable emission limitations and other control measures, means, or techniques" for achieving national air quality standards *and* to create "a program to provide for the enforcement of the measures described in [its SIP]." CAA § 110(a)(2)(A) & (C). EPA's abrupt reversal of its position is not supported by the Act or this Court's decision.

A. EPA Previously Correctly Recognized that the CAA Authorizes States To Adopt Affirmative Defense Provisions in their SIPs

For over 15 years, EPA has interpreted the Act to allow states to include an affirmative defense to civil penalties for exceedance of SIP-based emission limitations caused by SSM. 78 Fed. Reg. at 12,470-71; 1999 SSM Guidance at 2 (JA0399). Until EPA's supplemental notice, EPA encouraged states in their discretion to adopt affirmative defense provisions in SIPs to address unavoidable

emissions that EPA contended should not be exempt from regulation but for which penalties may not be appropriate. *See supra* p. 10-11.

In such circumstances, "EPA recognize[d] that imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner or operator may not be appropriate." 1999 SSM Guidance at 1-2 (JA0398-99); 78 Fed. Reg. at 12,469-70, 12,472 (affirmative defense may be "necessary to harmonize the competing interests of the CAA regarding continuous compliance and the limits or fallibility of technology"); 65 Fed. Reg. 70,792, 70,793 (Nov. 28, 2000) ("[w]e believe it would be inequitable to penalize a source for occurrences beyond the company's control."); Memorandum from K. Bennett, EPA Assistant Adm'r, to Reg'l Air Adm'rs, Subject: Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions, Attachment at 1 (Sept. 28, 1982) (JA0390) ("Generally, EPA agrees that the imposition of a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the owner and/or operator is not appropriate.").

And, when challenged, EPA vigorously defended the lawfulness of such provisions. *See, e.g.*, *Luminant*, 714 F.3d at 848. EPA also included an affirmative defense for malfunctions when it promulgated Federal Implementation Plans for Montana and New Mexico, pursuant to CAA § 110(c)(1). 73 Fed. Reg. at 21,432-33; 72 Fed. Reg. 25,698, 25,702, 25,708 (May 7, 2007).

EPA's prior approval of "affirmative defenses" was consistent with a plain reading of the Act and the broad discretion Congress provided states under CAA § 110 to craft emission limitations and other control measures only as "necessary or appropriate." *See Union Elec.*, 427 U.S. at 265. Indeed, every court that has considered the lawfulness of affirmative defenses in SIPs has found them permissible, as EPA concedes. *See* 78 Fed. Reg. at 12,470; *Luminant Generation Co. LLC v. EPA*, 714 F.3d 841 (5th Cir. 2013); *Mont. Sulphur & Chem. Co. v. EPA*, 666 F.3d 1174, 1192-93 (9th Cir. 2012) (an affirmative defense is a reasonable way to "compensate for the infeasibility problem"); *APS*, 562 F.3d at 1129, 1130 (the defense was based on "an adequate rationale" and "a reasonable interpretation of the [CAA]").

B. EPA's Extension of the *2014 NRDC Decision* Is Contrary to the Act

EPA's sole basis for now concluding that the CAA prohibits these "affirmative defenses" in SIPs is EPA's reading and extension of this Court's *2014 NRDC Decision*. *See* 80 Fed. Reg. at 33,851-52. Specifically, EPA concluded, based on the Court's "reasoning" in that case, that "the enforcement structure of the CAA" creates a "requirement of the Act" to which all SIPs must adhere or be found "substantially inadequate." *Id.* at 33,852-53.

In the *2014 NRDC Decision*, this Court considered whether *EPA* can include an affirmative defense to civil penalties for malfunctions when *EPA* promulgates

categorical national standards for HAPs under CAA § 112. That CAA section requires EPA to set "emission standards" at a specific level and, if EPA finds that implementation or enforcement of such standards is infeasible, authorizes work practice standards in their place. *See supra* p. 48. The Court reasoned that, once EPA had established emission standards that explicitly apply to portland cement plants even during malfunctions, if a cement plant violates those emission standards it would be up to the district court, in a civil enforcement action, to determine whether imposition of a civil penalty under CAA § 113 is "appropriate" under the circumstances. *See 2014 NRDC Decision*, 749 F.3d at 1063. The Court rejected EPA's claims of some general gap-filling or delegated authority to create a defense to civil penalties for violation of CAA § 112 standards, because it found that "Congress ha[d] not left the agency a gap to fill." *Id.* at 1064.

Thus, on its face, the *2014 NRDC Decision* did not address the issue raised by the SIP Calls: whether states are categorically prohibited from adopting affirmative defenses as part of the "mix" of controls and limits authorized to be included in a SIP under § 110. The *2014 NRDC Decision* itself acknowledged that the Fifth Circuit had recently concluded in *Luminant* that states *do* have the flexibility under the CAA to include affirmative defense provisions in SIPs, and the Court stated: "We do not here confront the question whether an affirmative defense may be appropriate in a State Implementation Plan." *Id.* at 1064 n.2.

The plain language of the Act answers the question this Court left open in the *2014 NRDC Decision*. Section 110 of the Act specifically grants states the authority to include in their SIPs state-defined "emission limitations and other control measures" that are "necessary or appropriate," and to develop "a program to provide for the enforcement of the measures." CAA § 110(a)(2)(A), (C). Affirmative defense provisions fit squarely within these grants of authority.

EPA ignores these explicit state authorities and looks instead to more-generic provisions in the Act. For example, EPA implies that CAA § 113(b), because it "provides courts with explicit jurisdiction to determine liability and to impose remedies," somehow constitutes a "requirement[]" of the Act with which affirmative defense provisions fail to comply. *See* 80 Fed. Reg. at 33,851. But the *2014 NRDC Decision* on which EPA relies does not even mention § 113(b). And § 113(b) authorizes the district court to impose penalties and other remedies when a "person has violated, or is in violation of, any requirement or prohibition of an applicable implementation plan." This is not a grant for a court to impose a penalty where the "requirement or prohibition" of the applicable SIP itself would impose none. Section 113(b) does not establish any requirements for SIPs. Section 110(a)(2) requires that the SIP include a "program to provide for the enforcement of the measures," but nowhere does it require that all SIP limitations be expressed in a way that they are enforceable through monetary penalties.

EPA also claims that affirmative defense provisions prevent the courts from applying the CAA § 113(e) criteria for determining appropriate penalties. 80 Fed. Reg. at 33,851. Those criteria only apply, however, once the court has found a SIP violation subject to penalties has occurred. But Congress put the responsibility for determining the set of requirements necessary to achieve NAAQS and meet other CAA requirements – including providing for enforcement – squarely with the state. *See Train*, 421 U.S. at 79. As EPA itself recently explained: "Allowing a State to design a limited affirmative defense is one way to allow a State to define what constitutes an enforceable emission limitation," and including such provisions in SIPs "is a proper exercise of [state] discretion under the CAA." Br. of Resp't EPA at 22-23, *Luminant*, 714 F.3d 841 (No. 10-60934) (JA0891-92).

In fact, EPA's assertion that the recitation of criteria for imposing a civil penalty in CAA § 113(e) somehow prevents a state from deciding that an affirmative defense is an appropriate element of its SIP was flatly rejected by the Fifth Circuit. *Luminant*, 714 F.3d at 853 n.9 ("the availability of the affirmative defense does not negate the district court's jurisdiction to assess civil penalties using the criteria outlined in section 7413(e), or the state permitting authority's power to recover civil penalties").

Thus, no court has adopted EPA's position in the SIP Calls that the CAA prevents states from using affirmative defenses as part of the system of control

measures a state includes in its SIP; and one decision, *Luminant*, contradicts EPA's latest interpretation of CAA requirements point-by-point. Two other circuits also have upheld inclusion of affirmative defense provisions for malfunctions as consistent with CAA requirements. *Supra* p. 55.

EPA's reading of the Act as establishing a requirement that all SIP emission limitations be subject to civil penalties without reference to criteria established by the state and regardless of circumstance is not consistent with the applicable statutory provisions. It directly contravenes congressional intent that the states – not the courts – decide what comprehensive set of "enforceable emission limitations and other control measures" and "program to provide for the enforcement of [those] measures" is needed to meet CAA requirements. CAA § 110(a)(2)(A) and (C); *see also* CAA § 107(a) ("Each State shall have the primary responsibility for assuring air quality within the…State by submitting an implementation plan for such State which will specify *the manner in which* [NAAQS] will be achieved and maintained…." (emphasis added)). It also is inconsistent with all applicable judicial precedent.

EPA provided no other grounds for its SIP Call of affirmative defense provisions and certainly no specific finding of deficiency as to any one of the

provisions.[29] Because states have the authority to provide for such provisions under § 110(a) and no provision of the Act prohibits them, EPA's SIP Calls as to affirmative defense provisions are unlawful and must be vacated.

CONCLUSION

For the foregoing reasons, the petitions for review should be granted and the SIP Calls vacated.

Dated: October 31, 2016

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[29] EPA describes the called SIP provisions as "very dissimilar" and "relatively unique from state to state," 80 Fed. Reg. at 33,858 n.52, but nevertheless declared them all unlawful without differentiating or examining any of them. *See id.* at 33,851.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rules 32(e)(1) and 32(e)(2)(C), I hereby certify that the foregoing final form Brief of Industry Petitioners contains 13,887 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and therefore is within the word limit set by the Court.

Dated: October 31, 2016

/s/ Lauren E. Freeman
Lauren E. Freeman

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure and Circuit Rule 25, I hereby certify that on this 31st day of October 2016, a copy of the foregoing final form Brief of Industry Petitioners was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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